

Senate Bill 306
House Judiciary
March 8, 2007

Testimony of Betsy Griffing
Legal Program Director
ACLU of Montana
Former Assistant Montana Attorney General

Madame Chair and Members of the Committee:

The main purpose of my written testimony is centered on the great financial costs of a death penalty prosecution. I have attached as an exhibit to my testimony a chart that shows why just the trial costs of a death penalty case far exceed the costs of a non-death penalty trial. I have also attached as an Exhibit A a list of those death penalty cases that arose in Montana since 1973 to the present. Although there are few hard numbers in Montana with respect to a comparison of the costs of death penalty cases vs. non death penalty cases, I can provide personal and first-hand testimony concerning the greater financial burden on the state regarding such cases.

For almost 5 years I was Bureau Chief of the Appellate Bureau at the Montana Attorney General's office and coordinator of a Death Penalty Task Force in that office. I was the supervising attorney for the Death Penalty Team that represented the State of Montana in the execution of Duncan McKenzie in 1995. Over the 9 years at the Attorney General's office I was the supervising appellate attorney for all of the 9 death penalty cases on appeal at that time: Terry Langford, David Dawson, Vern and Lester Kills On Top, Dan Johnson, Dewey Coleman, Douglas Turner and Rodney Sattler. I personally handled the appeal of Ronald Allen Smith twice before the Montana Supreme Court and in the federal court system.

In a non-death penalty case there is generally only one prosecuting attorney and one defense counsel. In a death penalty case, and in order to assure proper representation and procedures, there are at least two prosecuting attorneys – the local county attorney and an attorney from the Montana Attorney General's office which initially doubles the prosecution costs of a death penalty case to the county – the local government. Rather than just one public defender, a death penalty case requires two "death-qualified" public defenders. Again doubling the defense attorney costs over a non death penalty case. I have attached as Exhibit C a letter from the administrative director of the Public Defender Office which shows that the time spent by public defenders on the recent death penalty case in Bozeman was **760 hours** as opposed to the 30 hours spent on the stabbing in Helena of the Supreme Court law clerk, a case which was not prosecuted as a death penalty. Thus, from the beginning and just at the trial stage, a death penalty case requires four state-sponsored attorneys.

Death penalty cases are more complex procedurally. Every action by the police, prosecutors and defense counsel must be done absolutely correctly because of the high stakes involved and to assure that full constitutional requirements are met. Prosecutors must file initially a Notice of

intent to seek the death sentence. This generally triggers a set of pre-trial motions. Frequently, if the death sentence is sought, it is a high profile case and involves very sensational facts. Often, then, a motion for a change of venue is filed. Generally a case is heard where the crime occurred – the witnesses, the police, the attorneys are close at hand. But, because of the sensational nature of a death penalty case, it is not uncommon to have to change venue in order to find a jury that has not been tainted by the press in the areas. This means adding costs associated with bringing in factual witnesses, perhaps even paying for the county attorney and his staff aiding him, and the judge to travel at a different spot. Or, I have seen situations where it is too expensive to remove the trial and all of the witnesses, judge, prosecutors and defense counsel to a different venue, so a jury actually has to be shipped in and given housing during the week. And this is just in deciding **where** the trial is to take place.

Other numerous pre-trial motions are filed and fought fiercely in death penalty cases. Frequently, a question of the legality of a confession or the propriety of a search are at issue. Even if the merits of a motion may not be as strong as a defense counsel would like, in a death penalty case, defense counsel are obligated to raise almost every possible claim. Because of the high stakes and how their performance will be reviewed under a microscope later, they must file and argue all possible motions.

The cost of expert testimony in a death penalty trial is potentially astronomical. Frequently, the defendant's mental state is at issue at the trial and at least one expert hired both by the state and defense (all at the state's expense) to give expert testimony regarding whether a defendant had the capacity to have the requisite intent to commit the crime. And, while expert costs at trial are often great, they are even greater at the penalty phase of a death penalty case. At the penalty phase, the jury must consider and weigh "aggravating and mitigating" circumstances. Again, at least one expert for each side must be obtained in order for the jury to be able to fully consider the circumstances and appropriateness of actual imposition of the death penalty.

So, we know of the great added costs of having extra counsel on both sides, added costs of investigation, numerous motions filed and expert testimony. In Blaine County, in the prosecution of Lawrence Dean Jackson – prosecuted as a death penalty case, the court for defense counsel ALONE was \$311,306. And this was billed at \$60/hour. The current rate is \$120/hour, so a conservative estimate of the Blaine County prosecution now would be \$622,000 for defense costs, this can be easily doubled in prosecution time and expert testimony costs, with a total cost of \$1.2 million to prosecute such a trial.

Remember that the trial stage is only the beginning. There is an automatic appeal of a death penalty case, and then there are post-conviction proceedings that frequently look at the effectiveness of defense counsel. The cost of an appeal of a death penalty case is staggering in that it frequently lasts 20 years as in McKenzie and Dawson. We requested from the Attorney General's office an estimate of the tremendous cost of appeals of death penalty cases. I know when we were in the final months before the McKenzie execution, a literal team of attorneys from the Attorney General's office was working on the case, some filing responses in the district

courts, some in the 9th Circuit, and I was preparing briefs that were lodged in the US Supreme Court in anticipation of last minute appeals. The time and effort was literally staggering. We did not keep separate records of the time spent on death penalty appeals, and I recently requested the cost and time spent on appeals from that office. The Attorney General's office could not provide a figure on cost of death penalty cases. John Connor from that office stated that although the costs and time spent had never been separately calculated, they could affirm that they take considerable time and effort.

Again these appeals do not include one appeal to the Montana Supreme Court, but also review of those procedures in post-conviction system – they can easily accumulate to over 2,000 hours of attorney time over the course of a 10 to 20 year legal process – amounting to an additional \$240,000 in defense costs – and this does not count at least a similar amount of time spent in the attorney general's office. Assuming an appellate attorney spends a similar amount of time, the resulting costs is about another \$500, 000, making the total cost of any death penalty case almost \$2 million dollars.

Execution costs themselves are expensive – setting up the lethal injection chamber, personnel expenses and overtime – for the David Dawson execution it was approximately \$45,000. Studies in other states have said that the added cost of a death penalty trial is at least 48% (a study in Tennessee) or as much as 70% (a study in Kansas). A commission appointed by the Connecticut General Assembly stated that costs of a death penalty trial were DOUBLE those of a non-death penalty trial.

Lastly, and I will close with this thought. Even if the State incurs all this added expense of a death penalty trial, the majority of cases which go on appeal after imposition of a death sentence do not result in execution because error has been found at the trial stage. In New York, after the death penalty was reinstated in 1995, the state spent an estimated \$170 million prosecuting a handful of cases. After expending all this money, only seven death sentences were handed down in nine years, and of those, five have already been reversed on appeal. As Exhibit B on my handout shows – five of those who went through death penalty trials and appeals in Montana had to be resentenced because of plea bargaining down after either errors in the trial and sentencing phase of their cases or because of settlement.

In sum, every state that has ever undertaken a cost study of the death penalty system has found capital cases to be substantially more expensive than cases where prosecutors seek lengthy prison sentences. In terms of economics alone – cold hard numbers – it makes more sense to abolish the death penalty in favor of other sentencing options.

EXHIBIT A
Attached to Testimony of Betsy Griffing
Senate Bill 306, Senate Judiciary, February 7, 2007
**WHY TRIAL COSTS FOR DEATH PENALTY CASES ARE MUCH GREATER THAN FOR NON DEATH-
PENALTY CASES**

STAGE	DEATH PENALTY CASE	NON-DEATH PENALTY
Pre-Trial	2 attorneys appointed, possibly 2 prosecutors. ABA standards also require a defense team that includes a mitigation specialist and an investigator.	1 attorney, 1 prosecutor.
	More motions filed for both trial and sentencing; defense likely to file any motion that may be relevant no matter how much of a long shot it is because the stakes are so high.	
	Change of venue more likely.	Change of venue unlikely.
	Sequestered jury more likely.	Sequestered jury unlikely.
	More extensive investigations by both sides, including investigation into mitigating evidence, extensive hiring of expert witnesses including psychiatrists and psychologists.	Jury will not be presented with mitigating factors.
Trial	Individual questioning of jurors regarding death penalty views.	Short jury selection.
	Two-part trial: guilt and sentencing.	One-part trial.
	Almost all capital cases will go to trial and the trial will be longer than a non-capital trial.	About 95% of non-capital cases are settled without a trial through plea bargain.
	Sentencing involves a second trial with witnesses and experts before a jury.	Sentencing is brief, based on guidelines, made by the judge.
Post-Trial	Three levels of appeal, usually at taxpayer expense.	Only first level of appeal typically at taxpayer expense.
	More appealable issues: guilt and sentencing, collateral attacks on conviction and sentence are the norm.	Plea-bargained cases have few appealable issues; sentences are rarely overturned; collateral attacks are unusual.
	Sentence not carried out for about 10 years.	Sentence begins immediately.
	Higher security incarceration, similar to solitary confinement.	Typical confinement.
	No financial return from prison labor.	Prisoner can work to support himself and others and/or to provide compensation to victims' families.
	Clemency will be sought and the process can be lengthy and very political.	Clemency is rarely sought.
	68% of cases are overturned and either the whole trial or the sentencing trial must be done again.	Error rate is 15% or less.
	Less than 10% of sentences are carried out.	Hence, even in 90% of capital cases, the state will have to bear all the costs associated with life sentences, as well as most of the costs special to death sentences.
Over-all	Costs are up-front; mostly at trial level.	Costs are spread out over many years of incarceration.

EXHIBIT B
Attached to Testimony of Betsy Griffing
Senate Bill 306
House Judiciary
March 9, 2007

MONTANA DEATH ROW STATISTICS 1973 – 2006

Total sentenced to death:13

Executed.....3

David Thomas Dawson (8/11/06 @ 20 years on death row)

Terry Langford (02/24/98 @ 10 years on death row)

Duncan McKenzie (05/10/1995 @ 20 years on death row)

Died (Suicide)2

Rodney Sattler (02/02/2004)

Douglas Turner (07/08/2003)

Died (Non Suicide).....0

Resentenced by Courts.....5

Daniel Martin Johnson [LWOP (plea agreement)]

Bernard Fitzpatrick [300 years WOP]

Dewey Coleman [commuted to extended sentence]

Lester Kills on Top [2 consecutive life terms + 40 years WOP]

Vernon Kills on Top [2 consecutive life terms + 40 years WOP]

Sentence Commuted by Governor.....1

David Keith**

** Reasons reportedly included Keith's partial paralysis and blindness, remorse, religious conversion, and the possibility that he may have shot the victim as a reflex action. Note: Montana is a state in which the governor must have the recommendation of clemency from a board or advisory group.

Other Removals.....0

Under Sentence of Death 01/11/07.....2

William Jay Gollehon

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February 22, 2007

Mr. Scott Crichton
American Civil Liberties Union of Montana
P.O. Box 1317
Helena, MT 59624

Dear Mr. Crichton:

This letter provides you with information that you requested regarding the actual and estimated time spent by attorneys on two different court filings.

The first filing(s) that you mentioned includes the State of Montana vs. Miller and the State of Montana vs. Lebrum filed in Gallatin County. Currently the state is seeking the death penalty in these filings. The alleged crime happened in late June of 2006 and may continue for years assuming appeals, etc. The time spent to date is approximately 760 hours for five attorneys. The time remaining to conclude these filings is not estimable at this time.

The second filing(s) that you mentioned includes the State of Montana vs. Kirkbride and the State of Montana vs. Rickman filed in Lewis and Clark County. Currently the state is not seeking the death penalty in these filings. The crime was committed in mid-December 2006, the individuals pled in mid-January of 2007, and sentencing is expected by mid-April of 2007. The time spent to date was approximately 30 hours for two attorneys. There is a minimal amount of time needed to complete these filings.

If you have any questions, please call me at 406-496-6084.

Sincerely,

Harry Freebourn
Administrative Director

EXHIBIT C
TESTIMONY OF BETSY GRIFFING
SENATE BILL 306
House Judiciary Committee
March 9, 2007